



Hogan Lovells US LLP  
Columbia Square  
555 Thirteenth Street, NW  
Washington, DC 20004  
T +1 202 637 5600  
F +1 202 637 5910  
www.hoganlovells.com

Trey Hanbury  
Partner  
T: 202.637.5534  
trey.hanbury@hoganlovells.com

September 25, 2020

**VIA ECFS**

Ms. Marlene H. Dortch  
Secretary  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

**Re: IBFS File No. SAT-MOD-20200417-00037; Call Signs: S2983 and S3018; MVDDS  
5G Coalition Petition for Rulemaking to Permit MVDDS Use of the 12.2-12.7 GHz  
Band for Two-Way Mobile Broadband Service, RM-11768**

Dear Ms. Dortch:

This letter relates to the modification application proposed by Space Exploration Holdings, LLC (“SpaceX”). In the face of serious technical concerns that SpaceX’s latest modification application may interfere with consumers’ direct broadcast satellite (“DBS”) services, DISH Network LLC (“DISH”) has sought access to the data underlying SpaceX’s analysis of equivalent power flux density (“EPFD”) levels so that it may perform an independent analysis of the interference risk to DBS. Despite DISH’s willingness to agree to keep the data itself confidential, SpaceX has refused to produce the data absent unreasonable restrictions that would undermine the utility of access to the information. DISH respectfully requests the Commission order SpaceX to produce the data files underlying its EPFD analysis or deny the company’s modification request.

The Commission has authority to request the information it needs of applicants. Section 1.1 of the FCC’s rules provides that the Commission “may on its own motion or petition of any interested party hold such proceedings as it may deem necessary . . . for the purpose of obtaining information necessary or helpful in the determination of its policies, the carrying out of its duties or the formulation or amendment of its rules and regulations.”<sup>1</sup> To effect this investigative power, the same rule provides the FCC with the authority to “subpoena witnesses and require the production of evidence.”<sup>2</sup> Applicants wishing to protect information containing commercial, financial, trade secret, privileged or other protected communications have access to an

<sup>1</sup> 47 C.F.R. § 1.1; see also 47 U.S.C. § 154(j) (“The Commission may conduct its proceedings in such manner as will best conduce to the proper dispatch of business and to the ends of justice.”).

<sup>2</sup> 47 C.F.R. § 1.1.

exhaustive set of safeguards against routine public disclosure.<sup>3</sup> And when confidentiality has been requested, the Commission routinely issues protective orders that limit access to proprietary or confidential data and has experienced few, if any, documented disclosures of protected information.<sup>4</sup>

The Commission, in short, has ample authority to request the information needed to assess the risk of harmful interference into DBS, and SpaceX has no legitimate reason to withhold it. DISH respectfully requests the Commission to order production of the data files necessary to perform an EPFD interference analysis, or to dismiss SpaceX's modification application.

\* \* \*

SpaceX seeks to modify its authorization to lower the altitude of its proposed Starlink satellite constellation, which will operate in various bands of spectrum, including the 12.2-12.7 GHz band ("12 GHz band"), which is shared with DBS services. With the limited information SpaceX has made publicly available, DISH has presented significant evidence that SpaceX's proposed modifications could imperil DBS transmissions in the 12 GHz band.<sup>5</sup>

DISH has sought additional information from SpaceX to better assess the risk of interference to DBS that SpaceX's proposed system redesign may pose. In June, SpaceX dismissed DISH's analysis of the potential for SpaceX's system redesign to cause harmful interference to DBS subscribers. SpaceX then said it had "offered to provide the data files underlying its analysis to any interested party wishing to perform its own analysis."<sup>6</sup> In August, DISH reiterated its concerns about the risk for harmful interference from SpaceX's proposed system redesign and said that it had asked SpaceX for the data the company had promised to make available to "any interested party wishing to perform its own analysis."<sup>7</sup>

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<sup>3</sup> See *id.* § 0.459.

<sup>4</sup> See, e.g., *AMC Networks Inc. v. AT&T Inc.*, Order, DA 20-890, MB Docket No. 20-254, ¶ 4 n.7 (MB rel. Aug. 17, 2020) (listing recent investigations entering protective orders); *Applications of Charter Communications, Inc., Time Warner Cable Inc., and Advance/Newhouse Partnership for Consent to Assign or Transfer Control of Licenses and Authorizations*, Order, 30 FCC Rcd 10360, ¶¶ 3-4 (2015) ("The Commission has successfully used protective orders in its review of license transfer applications for over 15 years. . . . they have in fact become routine.") ("[W]e find that our protective orders are sufficient to protect the confidentiality of even highly competitively sensitive information and that the risk of competitive injury is therefore minimal.").

<sup>5</sup> See Letter from Jeffrey Blum, Executive Vice President, External and Legislative Affairs, DISH Network LLC, to Marlene Dortch, Secretary, FCC, IBFS File No. SAT-MOD-20200417-00037 (filed June 16, 2020).

<sup>6</sup> Letter from David Goldman, Director of Satellite Policy, SpaceX, to Marlene Dortch, Secretary, FCC, IBFS File No. SAT-MOD-20200417-00037, at 1 (filed June 29, 2020).

<sup>7</sup> Letter from Jeffrey Blum, Executive Vice President, External and Legislative Affairs, DISH Network LLC, to Marlene Dortch, Secretary, FCC, IBFS File No. SAT-MOD-20200417-00037, at 1 (filed Aug. 6, 2020).

Throughout the months of August and September, however, SpaceX dodged DISH's information requests. In emails exchanged between DISH and SpaceX over the summer and into the fall, SpaceX refused to provide the underlying EPFD data files unless DISH agreed to confine any analysis to the narrow issue of whether or not SpaceX's EPFD showings merited a "favorable" or "qualified favorable" finding from the ITU.<sup>8</sup> Absent an express stipulation that any analysis would remain confined to "whether the EPFD data is compliant with ITU regulations," SpaceX said it would reject DISH's request and added that it would "let the FCC know" DISH had "no need for the data for the purpose for which it was offered."<sup>9</sup>

The chronology of correspondence between representatives of DISH and SpaceX is telling:

- **July 31, 2020:** DISH's Alison Minea wrote SpaceX's David Goldman asking for information relevant to assessing EPFD levels that SpaceX's system would produce in the 12.2-12.7 GHz DBS band, including the following:<sup>10</sup>
  - All data inputs SpaceX has used to calculate the single-entry validation EPFD downlink limits for its proposed modification.
  - Computer files that contain Ku- band power flux-density ("PFD") masks for each space station in the modified SpaceX System and the methodology used to generate these PFD masks.
  - Input data files containing the orbital parameters and other information concerning the modified SpaceX System necessary to run the EPFD validation software.
  - Any other information that would be sufficient to calculate a single-entry EPFD value.
  - A detailed description of the assumptions and methodology SpaceX used to calculate the EPFD downlink value.
  - A summary of the results, including any graphical output files.
  - Any data dictionaries or other user manuals that describe and define each variable/input, or other materials that might assist DISH's engineers in deciphering the information and minimize the need for follow-up questions.
  - Any information of a type and nature similar to that which SpaceX disclosed in the Annex 1 and 2 of the Technical Attachment in its original application (SAT-LOA-20161115-00118).

DISH expressed its preference that this information appear on the public record, but indicated a willingness to review this information subject to a non-disclosure agreement.

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<sup>8</sup> Email from David Goldman, Director of Satellite Policy, SpaceX, to Alison Minea, Director of Regulatory Affairs, DISH Network LLC (Aug. 24, 2020).

<sup>9</sup> *Id.*; Email from David Goldman, Director of Satellite Policy, SpaceX, to Alison Minea, Director of Regulatory Affairs, DISH Network LLC (Aug. 31, 2020).

<sup>10</sup> Email from Alison Minea, Director of Regulatory Affairs, DISH Network LLC, to David Goldman, Director of Satellite Policy, SpaceX (July 31, 2020).

- **Aug. 4, 2020:** SpaceX's Goldman replied to DISH's Minea. He said that SpaceX would only agree to provide the information pursuant to a non-disclosure agreement dated February 9, 2018, that SpaceX had entered with DISH.<sup>11</sup>
- **Aug. 5, 2020:** DISH's Minea replied that DISH "plan[s] to use the data files to analyze possible interference to DBS customers and want to share that analysis with the FCC. We would agree to request confidentiality under Section 0.459 for any data that SpaceX deems confidential." She asked whether filing under an FCC-issued protective order of confidentiality would be acceptable to SpaceX.<sup>12</sup>
- **Aug. 6, 2020:** SpaceX's Goldman said he could agree to this approach, but asked for new language to prohibit DISH from sharing its interference analysis with the FCC even subject to a protective order. The provision SpaceX proposed read as follows: "You may disclose Dish's analysis to the FCC *only, solely* [sic] *for the purpose of supporting a claim of compliance with ITU-R Radio Regulations Article 22 and Resolution 76 (Rev. WRC-15)*, so long as You maintain or apply appropriate markings necessary to notify the FCC of the confidential nature and SpaceX's ownership of the information and comply with all necessary FCC regulations to request that SpaceX's EPFD analysis is withheld from public inspection, including 47 CFR § 0.459."<sup>13</sup>
- **Aug. 20, 2020:** After various efforts to understand the purpose of SpaceX's limit on DISH's ability to use the data, DISH's Minea wrote SpaceX's Goldman asking to use DISH's standard NDA in lieu of SpaceX's form.<sup>14</sup>
- **Aug. 24, 2020:** SpaceX's Goldman replied. He said an existing NDA between SpaceX and DISH should "adequately cover your needs." He added that "[t]he language we proposed should allow you to address with the FCC any concerns you may have with whether the EPFD data is compliant with ITU regulations."<sup>15</sup>
- **Aug. 28, 2020:** DISH's Minea wrote SpaceX's Goldman to say that she was "still... not comfortable" with the use limitation SpaceX proposed. "While of course protecting confidentiality, we want to be able to share our comprehensive views with the FCC about the EPFD data," she wrote. "Can you work with us on this point?"<sup>16</sup>
- **Aug. 31, 2020:** SpaceX's Goldman replied. He said SpaceX had "offered the EPFD data so that stakeholders could assess our proposed modification's compliance with relevant

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<sup>11</sup> Email from David Goldman, Director of Satellite Policy, SpaceX, to Alison Minea, Director of Regulatory Affairs, DISH Network LLC (Aug. 4, 2020).

<sup>12</sup> Email from Alison Minea, Director of Regulatory Affairs, DISH Network LLC, to David Goldman, Director of Satellite Policy, SpaceX (Aug. 5, 2020).

<sup>13</sup> Email from David Goldman, Director of Satellite Policy, SpaceX, to Alison Minea, Director of Regulatory Affairs, DISH Network LLC (Aug. 6, 2020) (emphasis added).

<sup>14</sup> Email from Alison Minea, Director of Regulatory Affairs, DISH Network LLC, to David Goldman, Director of Satellite Policy, SpaceX (Aug. 20, 2020).

<sup>15</sup> Email from David Goldman, Director of Satellite Policy, SpaceX, to Alison Minea, Director of Regulatory Affairs, DISH Network LLC (Aug. 24, 2020).

<sup>16</sup> Email from Alison Minea, Director of Regulatory Affairs, DISH Network LLC, to David Goldman, Director of Satellite Policy, SpaceX (Aug. 28, 2020).

[ITU] EPFD requirements.” He added that “[i]f you have no need for the data for the purpose for which it was offered, we can let the FCC know.”<sup>17</sup>

- **Aug. 31, 2020:** DISH’s Minea replied. She wrote that “no matter what, DISH will seek confidential treatment for any underlying SpaceX data and/or analysis that you provide to us, either through suppressing whole documents or redacting public documents.” She added that DISH could not “agree to limit what conclusions or analysis we share with the FCC in light of the data.” She said “[w]e think we should be able to share our full views with the FCC about the implications of the EPFD data. The FCC then, in its own capacity, can decide whether it agrees with our views and what actions the agency might take in light of its jurisdiction and authority.” Minea asked for a call to resolve the issue.<sup>18</sup>
- **Sept. 1, 2020:** SpaceX’s Goldman and DISH’s Minea exchanged multiple emails proposing times for a call and settled on Thursday, Sept. 3, 2020.<sup>19</sup>
- **Sept. 3, 2020:** Goldman, Minea and Jeffrey Blum of DISH participated in a conference call. The parties disagreed about whether or not studying interference risk was a legitimate purpose for the data DISH had asked SpaceX to share. The parties could not resolve their disagreement.
- **Sept. 9, 2020:** Following up on the call, DISH’s Minea wrote SpaceX’s Goldman. She said she want to “check back and see if you had any further thoughts on the NDA process”.<sup>20</sup> Goldman did not respond.
- **Sept. 17, 2020:** DISH’s Minea wrote to SpaceX’s Goldman. She said she was “just checking back to see if you can work with us on the NDA.”<sup>21</sup> Goldman did not respond.
- **Sept. 23, 2020:** Since DISH had not received any response to DISH’s emails of Sept 9 and Sept 17, DISH’s Minea again wrote to SpaceX’s Goldman. She said that if SpaceX were to continue to refuse to permit DISH to use the EPFD data for an interference analysis, DISH “intend[s] to inform the FCC” and will “request that the FCC order SpaceX to produce the data files underlying its EPFD analysis.”<sup>22</sup> She provided a deadline of 5:00 pm EST on Sept. 24, 2020 to receive a response from SpaceX.

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<sup>17</sup> Email from David Goldman, Director of Satellite Policy, SpaceX, to Alison Minea, Director of Regulatory Affairs, DISH Network LLC (Aug. 31, 2020).

<sup>18</sup> Email from Alison Minea, Director of Regulatory Affairs, DISH Network LLC, to David Goldman, Director of Satellite Policy, SpaceX (Aug. 31, 2020).

<sup>19</sup> See, e.g., Email from David Goldman, Director of Satellite Policy, SpaceX, to Alison Minea, Director of Regulatory Affairs, DISH Network LLC (Sept. 1, 2020); Email from Alison Minea, Director of Regulatory Affairs, DISH Network LLC, to David Goldman, Director of Satellite Policy, SpaceX (Sept. 1, 2020).

<sup>20</sup> Email from Alison Minea, Director of Regulatory Affairs, DISH Network LLC, to David Goldman, Director of Satellite Policy, SpaceX (Sept. 9, 2020).

<sup>21</sup> Email from Alison Minea, Director of Regulatory Affairs, DISH Network LLC, to David Goldman, Director of Satellite Policy, SpaceX (Sept. 17, 2020).

<sup>22</sup> Email from Alison Minea, Director of Regulatory Affairs, DISH Network LLC, to David Goldman, Director of Satellite Policy, SpaceX (Sept 23, 2020).

SpaceX did not respond to DISH's emails of September 9, September 17, or September 23, 2020.

As important as compliance with ITU regulatory policies may be, the question of whether or not SpaceX has complied with the ITU EPFD filing requirements misses the critical question of whether or not SpaceX's proposed system redesign, in fact, will interfere with DBS receivers. The entire purpose of DISH's information request to SpaceX was to analyze the risk of harmful interference to DBS consumers.<sup>23</sup> No reasonable stakeholder could or would agree to SpaceX's stipulation that information sharing would only occur on condition that the recipient suppress any findings of the real-world harm that SpaceX's EPFD emissions may cause to DBS consumers and focus on the question of SpaceX's satisfaction of ITU requirements instead.

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In July, DISH said that "SpaceX continues to stonewall interested stakeholders and refuses to provide the technical analysis and information requested to date."<sup>24</sup> DISH then called on the FCC to "require more information from SpaceX or dismiss the company's modification application as deficient."<sup>25</sup> Since then, DISH has made every reasonable effort to obtain the data on a confidential basis from SpaceX necessary to quantify the interference risk that SpaceX's system redesign poses to DBS operations. Private party-to-party discussions are, unfortunately, at an impasse. The FCC has authority to require applicants to submit additional information into the record.<sup>26</sup> Accordingly, DISH respectfully requests the FCC either require production of the data

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<sup>23</sup> See Letter from Jeffrey Blum, Executive Vice President, External and Legislative Affairs, DISH Network LLC, to Marlene Dortch, Secretary, FCC, IBFS File No. SAT-MOD-20200417-00037 (filed July 14, 2020).

<sup>24</sup> *Id.* at 2.

<sup>25</sup> *Id.*

<sup>26</sup> 47 C.F.R. § 1.1. The Commission has consistently held that parties to a proceeding are entitled to information on which the applicants purport to rely and that any concerns regarding confidentiality or burdensomeness can be addressed in a protective order. For example, the Commission found that petitioners seeking to deny an application to transfer licenses were entitled to access documents bearing on the anti-trafficking issue raised in the their petition to deny despite insistence from applicants that they had already publicly disclosed all information necessary for resolution of the issue. *In re Applications of Mobile Communications Holdings Inc.*, Disclosure Order, 18 FCC Rcd 133, ¶¶ 4-5 (2003). The Commission ordered applicants to disclose the documents under a protective order substantially identical to other protective orders issued in contemporary proceedings, and refused the more onerous restrictions applicants sought in the alternative. *Id.* ¶ 6. In another proceeding, the Enforcement Bureau permitted each party to conduct discovery. *Nova Cellular West v. AirTouch Cellular*, Order, 15 FCC Rcd 14973, ¶ 2 (EB 2000). After the staff granted petitioner's request to conduct additional discovery of the respondent, the respondent filed an emergency motion seeking suspension of ongoing discovery and the scheduling conference, arguing the petition should be denied and the petitioner should be required to file a formal complaint before seeking the discovery. *Id.* ¶¶ 2-3. The staff denied the request. It found that the procedures were fair and reasonable, and permitted under the Commission's "broad discretion to 'conduct its proceedings in such manner as will best conduce to the proper dispatch of business and ends of justice.'" *Id.* ¶ 3 (quoting Section 4(j) of the Communications Act, 47 U.S.C. § 154(j)).

necessary to evaluate EPFD interference risk (under a protective order if required), or dismiss SpaceX's satellite modification application.

Please feel free to contact me with any questions regarding this submission.

Sincerely,

/s/ Trey Hanbury

Trey Hanbury  
Partner  
Hogan Lovells US, LLP